

No. 15302

United States
Court of Appeals
for the Ninth Circuit

MILTON C. CHARLES,

Appellant,

vs.

WILLIAM N. BOWIE, JR., as Trustee in Bank-
ruptcy of American Aeronautics Corporation,
Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

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PAUL P. O'BRIEN, CLERK



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for the Ninth Circuit

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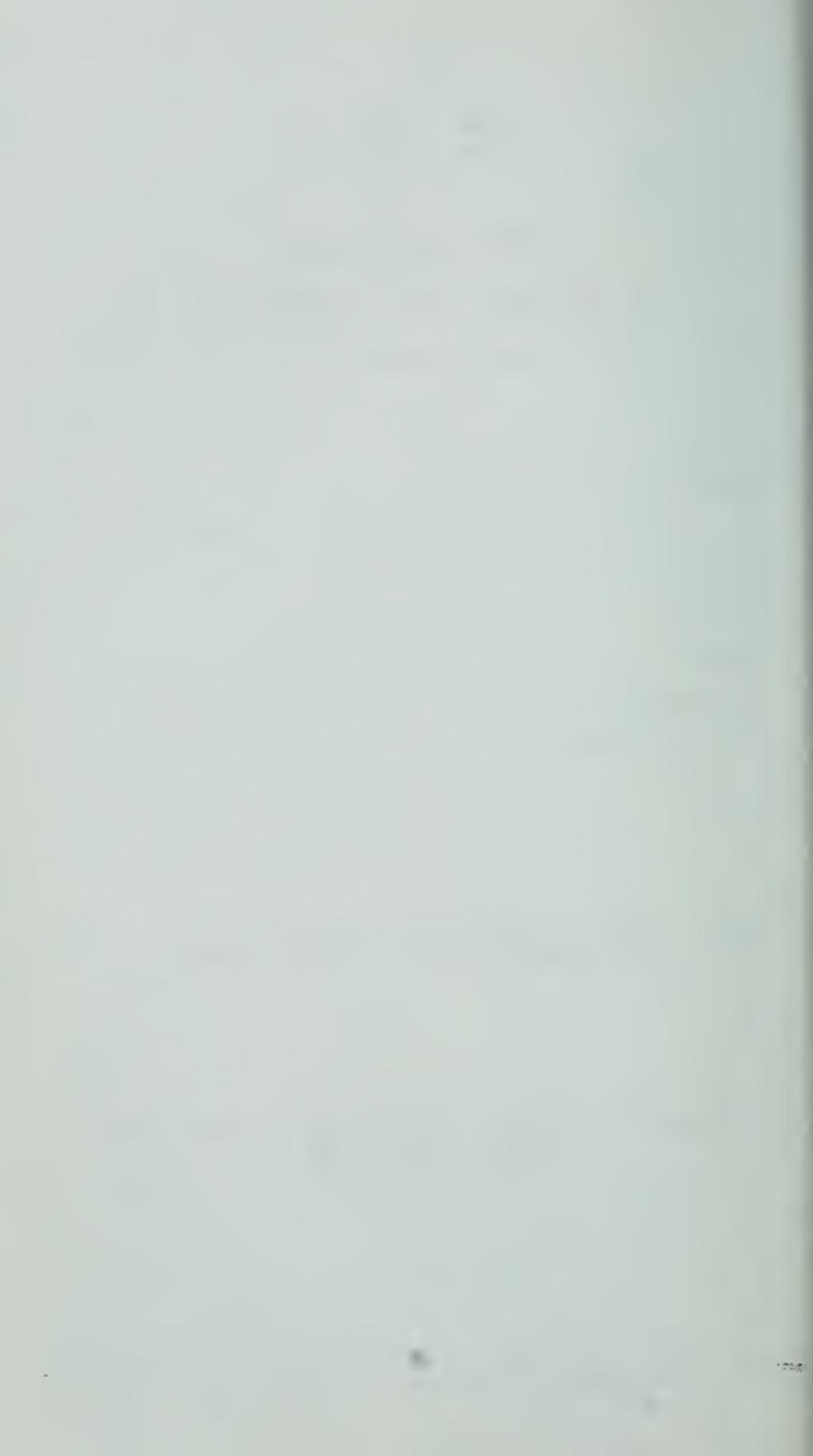
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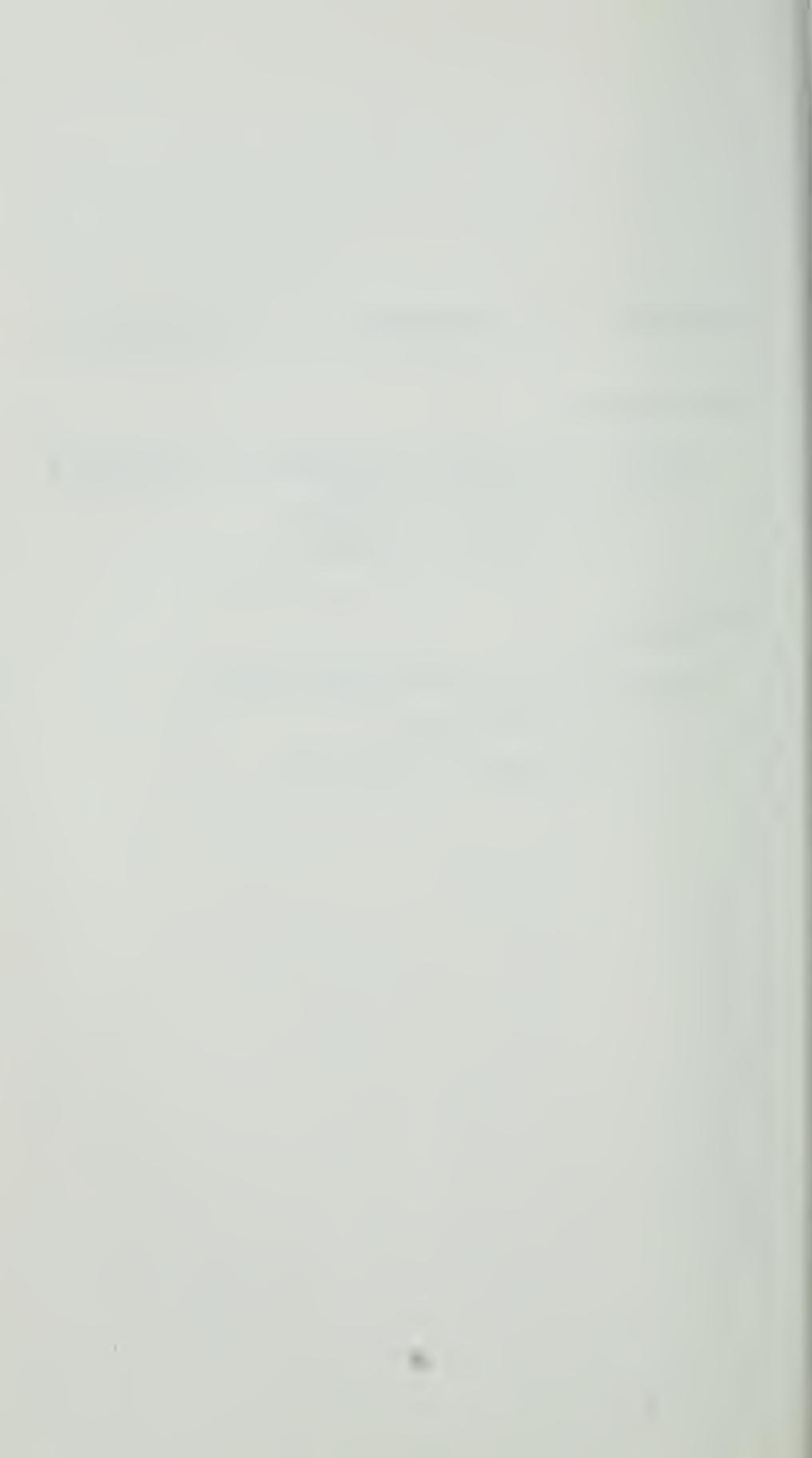
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In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 68155-PH

In the Matter of

AMERICAN AERONAUTICS CORPORATION,
a Corporation,

Bankrupt.

**PETITION FOR ORDER
TO SHOW CAUSE**

To the Honorable David B. Head, Referee in Bank-
ruptcy:

The petition of Milton C. Charles respectfully
shows:

1. That he is a Certified Public Accountant, duly licensed to practice under the laws of the State of California;
2. That on or about February 15, 1955, the above-named bankrupt, in writing, and for a present and valuable consideration, assigned to petitioner the sum of \$4,000 from a Federal Income Tax refund due from the Director of Internal Revenue;
3. That said Federal Income Tax refund has been received by the Trustee in Bankruptcy of the above-named bankrupt, William N. Bowie, Jr., in an amount of approximately \$9,600.00.
4. That said Trustee in Bankruptcy has refused and still refuses to pay from said sum the amount of petitioner's assignment.

Wherefore, petitioner prays for an order directing the within named Trustee in Bankruptcy to appear and show cause, if any he has, why an order should not be made and entered herein [2*] decreeing that the said Trustee in Bankruptcy pay to petitioner the sum of \$4,000.00 from the proceeds of the Federal Income Tax refund in the possession of said Trustee; and for such other and further relief as to the Court seems just.

/s/ MILTON C. CHARLES,
Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed February 3, 1956. [3]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading and filing of the verified petition of Milton C. Charles, and good cause appearing therefor, and no adverse interest appearing,

It Is Ordered that William N. Bowie, Jr., Trustee in Bankruptcy of the above-entitled bankrupt, appear before the undersigned at his courtroom, 340 Federal Building, Temple and Spring Streets, Los Angeles, California, on Thursday, February 9, 1956, at the hour of 10:00 a.m., then and there to show cause, if any he has, why an order should not be

made and entered herein in accordance with the prayer of the said petition.

It Is Further Ordered that a copy of said petition and of this order to show cause be served upon said Trustee in Bankruptcy by United States Mail not less than five days prior to the hearing thereon.

Dated: February 3, 1956.

/s/ HOWARD V. CALVERLY,
Referee in Bankruptcy.

Affidavit of service by mail attached.

[Endorsed]: Filed February 3, 1956. [5]

In the United States District Court, Southern
District of California, Central Division

No. 68155-PH

In the Matter of
AMERICAN AERONAUTICS CORPORATION,
a Corporation,
Bankrupt.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER RE ORDER TO SHOW
CAUSE OF MILTON C. CHARLES**

The Order to Show Cause heretofore made and issued in this proceeding on February 3, 1956, upon the petition of Milton C. Charles came on regularly for hearing on the 9th day of February, 1956, at

10:00 a.m. of said day before Honorable David B. Head, Referee in Bankruptcy, in his courtroom, 304 Federal Building, Temple and Spring Streets, Los Angeles 12, California, at which time petitioner Milton C. Charles appeared by his attorneys Marvin Gross and Anthony T. Carsola by Marvin Gross, Esq., and William N. Bowie, Jr., as Trustee in Bankruptcy herein, appeared by his attorney Haskell H. Grodberg, Esq., at which time evidence both oral and documentary was received, and the Court having heard the testimony and having examined the proofs offered, and the cause having been duly submitted to the Court for decision, and the Court being fully advised in the premises, the Court now makes its Findings of Fact as follows:

Findings of Fact

I.

It is true that petitioner Milton C. Charles is [7] a Certified Public Accountant duly licensed to practice as such under the laws of the State of California.

II.

It is true that on the 15th day of February, 1955, the above-named bankrupt made an assignment in writing to petitioner Milton C. Charles of a portion of a Federal Income Tax refund to be processed through the Office of the Director of Internal Revenue; that said portion was in an amount which would reasonably compensate said petitioner for personal services to be performed by him in connection

with doing the necessary accounting for and preparing and filing the Income Tax return required in order to obtain the said claim for refund.

III.

It is true that the said Milton C. Charles did and performed said accounting services and prepared and filed the said return. It is true that the said Milton C. Charles was required to and did work for a period of three days in performing said services. It is true that the reasonable value of said services was and is the sum of \$100.00 per day, to wit, the total sum of \$300.00.

IV.

It is true that since the execution and delivery of said assignment and since the performance of said work and labor that said Federal Income Tax refund has been received by William N. Bowie, Jr., as Trustee in Bankruptcy of the above-named bankrupt in an amount sufficient to pay the said sum of \$300.00 to said Milton C. Charles, in full. It is true that no part thereof has been paid to said petitioner to date hereof.

Conclusions of Law

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That William N. Bowie, Jr., as Trustee in Bankruptcy of [8] the above-named bankrupt should be ordered to pay forthwith to petitioner Milton C. Charles the sum of \$300.00 from the proceeds de-

rived by said Trustee from the aforementioned Income Tax refund.

Order

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged, and Decreed:

That William N. Bowie, Jr., as Trustee in Bankruptcy of the above-named bankrupt pay to Milton C. Charles the sum of \$300.00.

Dated: February 27, 1956.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

Receipt of copy acknowledge.

Received February 20, 1956.

[Endorsed]: Filed February 27, 1956. [9]

[Title of District Court and Cause.]

PETITION TO REVIEW
REFEREE'S ORDER

To the Honorable David B. Head, Referee in Bankruptcy:

The petition of Milton C. Charles respectfully shows:

That your petitioner is a person aggrieved by an order of a Referee, and is a creditor of the Bankrupt in the above-entitled matter;

That on February 9, 1956, an Order to Show Cause was heard, pursuant to the petition of your

petitioner herein, to determine the validity of a \$4,000.00 written assignment from the Bankrupt to your petitioner; that said claim was based upon labor and services performed by the petitioner as a Certified Public Accountant;

That after said hearing, before the Honorable David B. Head, Referee in Bankruptcy, Findings of Fact, Conclusions of Law and Order were entered on February 28, 1956, by the said Referee, summarily denying petitioner's claim, except in the amount of \$300.00;

That said Order was and is erroneous in the following [11] particulars:

1. Said Order is not supported by the evidence adduced at said hearing;
2. Said Order fails to consider the clear and undisputed intent of the parties to said assignment;
3. Said Order fails to construe said assignment in accordance with the undisputed intent of the parties thereto;
4. Said Order fails to interpret said assignment against the Bankrupt, the maker thereof, and in favor of your petitioner;
5. Said Order specifically contradicts said assignment, substituting the amount of \$300.00 in the place and stead of \$4,000.00, contrary to the undisputed intent of both parties to said assignment;
6. Said Order wholly fails to consider the circumstances surrounding said assignment, and the interpretation placed thereon by both parties;

7. Paragraph III of said Findings of Fact is erroneous in the following particulars:

a. There is no evidence to support the finding that your petitioner worked for a period of three days in performing said services; rather, the undisputed testimony shows that your petitioner worked a period in excess of forty (40) days in performing said services.

b. There is no evidence to support the finding that the reasonable vale of the services performed was in the amount of \$300.00.

8. That said Findings of Fact are not supported by the evidence;

9. That said Conclusions of Law are erroneous in that the Trustee should be ordered to pay to your petitioner the [12] sum of \$4,000.00 rather than the sum of \$300.00.

Wherefore, your petitioner, being aggrieved by said Order, prays that the same may be reviewed by a Judge of this Court as provided by the Bankruptcy Act.

MARVIN GROSS &
ANTHONY T. CARSOLA,

By /s/ MARVIN GROSS,
Attorneys for Petitioner.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed March 1, 1956. [13]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Peirson M. Hall, Judge of the United States District Court, Southern District of California, Central Division:

I, David B. Head, a Referee in Bankruptcy of this court, do certify as follows:

Milton C. Charles petitioned this court for an order to show cause why the trustee should not be ordered to turn over to the petitioner the sum of \$4,000.00 received by the trustee as a refund from the Director of Internal Revenue.

The petitioner's claim is based on a document signed by the bankrupt which reads as follows:

"Because of the fact that this corporation appears to be entitled to a substantial Income Tax refund and has no monies with which to pay your fees to do the necessary accounting and prepare and file the return in order to obtain it, it is our wish to make some arrangement with you for payment of your services in connection with claim for refund. From estimates [15] received from you, it would appear that this may take as much as forty hours or more in work to be performed by you, and you may consider this an assignment of whatever refund we receive as a result of your services to the extent of \$4,000.00 for such services."

Testimony was taken which tended to show that the petitioner had performed some 40 days of work on the preparation of the application for tax refund but that only 3 days of this work was performed after the assignment was executed.

I pointed out to the parties that I could give effect to the assignment only to the extent of the value of the services rendered after the date of the assignment. Counsel for the petitioner seemed to take the position that the assignment should be interpreted to give it retroactive effect. I pointed out to counsel that the assignment read prospectively and not retroactively and that, if this interpretation were given it, violence to the terms of the assignment would be done. However, I suggested that his remedy was to petition for reformation of the document, so that the true intention of the parties would be expressed and the rights of any third parties could be determined. He did not ask for leave to amend. Findings and conclusions were entered and a petition for review has been filed.

The question presented is whether or not the assignment in question can be interpreted so as to reform it under the present pleadings?

I don't believe that Rule 8 (f) R.C.P. can be stretched to cover this situation.

I certify the following documents from the file:

- (1) Petition for Order to Show Cause;
- (2) Order to Show Cause;

- (3) Exhibit 1; [16]
- (4) Findings of Fact and Conclusions of Law;
- (5) Petition for Review.

Dated this 6th day of March, 1956.

Respectfully submitted,

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed March 6, 1956. [17]

[Title of District Court and Cause.]

REFEREE'S SUPPLEMENTARY
CERTIFICATE ON REVIEW

To the Honorable Peirson M. Hall, Judge of the United States District Court, Southern District of California, Central Division:

I, David B. Head, a Referee in Bankruptcy of this court, do further certify as follows:

- (1) Reporter's Transcript of Proceedings.

Dated this 8th day of March, 1956.

Respectfully submitted,

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed March 8, 1956. [18]

Milton C. Charles vs.

United States District Court, Southern District
of California, Central Division

No. 68,155—PH

In the Matter of
AMERICAN AERONAUTICS CORPORATION,
Bankrupt.

ORDER

The Order of the Referee on review by Petition
of Milton C. Charles is affirmed.

Dated: Los Angeles, California, this 18th day of
June, 1956.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed June 18, 1956.

Entered June 19, 1956. [19]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Milton C. Charles, petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the Referee in Bankruptcy, David B. Head, entered February 27, 1956, and from the Order on Petition for Review by the Honorable Peirson M. Hall, Judge, United States District Court, entered on June 19, 1956.

Dated: July 12, 1956.

MARVIN GROSS &
ANTHONY T. CARSOLA,

By /s/ MARVIN GROSS,
Attorneys for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed July 13, 1956. [20]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now petitioner-appellant Milton C. Charles and files the following Statement of Points on Appeal:

1. The Order of the Referee on the Order to Show Cause is contrary to law and fact;
2. There is no evidence to support said Order.

Dated: July 16, 1956.

MARVIN GROSS &
ANTHONY T. CARSOLA,

By /s/ MARVIN GROSS.

Affidavit of service by mail attached.

[Endorsed]: Filed July 16, 1956. [25]

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 68,155—PH

In the Matter of:

AMERICAN AERONAUTICS,

Bankrupt.

HEARING RE: ORDER TO SHOW CAUSE,
MILTON C. CHARLES VS. WILLIAM N.
BOWIE

The following is a stenographic transcript of the proceedings in the above-entitled cause, which came on for hearing before the Honorable David B. Head, United States Referee in Bankruptcy, at his court-room, 340 Federal Building, Los Angeles, California, at the hour of 10:00 o'clock, on Thursday, February 9, 1956.

Before: Honorable David B. Head, Referee in
Bankruptcy.

Appearances of Counsel:

For the Trustee:

HASKELL GRODBERG, ESQ.

For the Petitioner:

MARVIN GROSS, ESQ.

Thursday, February 9, 1956—10:00 A.M.

The Referee: This is the matter of Charles against Bowie. Who is appearing for the petitioner?

Mr. Gross: Marvin Gross, your Honor.

Mr. Grodberg: If the Court please, before commencing with this, Mr. Welch of Latham and Wat-

kins is present representing Grand Central Aircraft Company. I think that I should make some explanation of his presence and of the matter which I had discussed with him. Mr. Bowie does not happen to be here.

The Referee: Yesterday I received in the mail a copy of about a four-page letter from Mr. Bowie. Are you agreed upon this stipulation, the two stipulations which you are talking about?

Mr. Grodberg: As far as I know, that is so, your Honor. I was under the impression that we would have the second of these stipulations here today. I spoke to Mr. Bowie and he said he would get in touch with Mr. Youngblood.

I called Mr. Youngblood again yesterday and he again stated that he was in agreement, as I set forth in that letter, but he stated that on Friday last he had mailed the Stipulation No. 2, which had been in his possession, back to Mr. Bowie. [2*]

Now, in a subsequent conversation I had with Mr. Bowie relating to this Charles matter, he told me that he would be here today, and I assumed that he would be here and bring that stipulation along, too.

I advised Mr. Welch that in view of the fact that Mr. Youngblood wanted Stipulation No. 3 filed at the time that Stipulation No. 2 was filed and in view of the fact that we wanted Mr. Welch's Stipulation No. 2 filed when No. 3 was filed, we would all file them here together.

The Referee: Will you bring them in together at the same time whenever you can get them in?

Mr. Grodberg: I felt that I should explain that so Mr. Welch will understand I did what I could.

Mr. Welch: I do understand and I further understand that counsel on both sides have not only accepted, but have signed this stipulation and it is just a matter of its production at this time.

The Referee: All right. When you get both stipulations, just simply file them in the Clerk's office.

Mr. Grodberg: Thank you.

The Referee: I will approve the stipulations.

Mr. Welch: Thank you, your Honor.

The Referee: All right. In the Charles matter, what is your position here, Mr. Gross?

Mr. Gross: Well, your Honor, I have gone [3] through the file which you have before you and it seems there was a case quite similar factually and legally to the one we have today.

Mr. Charles, the petitioner, has put in some 40 days of accounting time. He had put it in to straighten out the books and prepare the books for American Aeronautics Corporation. He had put in the greater portion of his time prior to February 15, 1955, at which time a discussion was had between Mr. Charles and American Aeronautics regarding payment of his fees. He had not received anything up to date and he was, of course, attempting to make arrangements for reimbursement.

On that date, the corporation assigned to Mr. Charles for his past services and for his promise to continue and finish the job that he had undertaken to straighten out the books to the extent of \$4,000, a

claim for refund which was expected to return from the Department of Internal Revenue very shortly.

Mr. Charles did finish up the work and complete the job that he had undertaken, and now, we understand that claim has been received and is in the possession of the trustee in bankruptcy and he has refused to pay over \$4,000.

The Referee: The assignment was in what form?

Mr. Gross: It is in written form, your Honor.

The Referee: Yes. [4]

Mr. Grodberg: The Trustee advised me that he had not been presented this in written form.

The Referee: You may go ahead with your proof, Mr. Gross.

Mr. Gross: Mr. Strube, will you take the stand?

GORDON D. STRUBE

called on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gross:

Q. Mr. Strube, you were president of American Aeronautics Corporation, were you not?

A. Yes.

Q. For how long a period were you president?

A. Approximately six years.

Q. Directing your attention to sometime in 1954, did you approach Mr. Milton C. Charles relative to some accounting work for your firm?

A. Yes, I did.

Q. Do you know approximately when that was?

(Testimony of Gordon D. Strube.)

A. About the first part of July of 1954.

Q. As a result of the discussion which you had with him, did he undertake to perform certain work for the firm? A. Yes, he did. [5]

Q. Generally, what was the nature of the work to be done, do you know?

A. Yes, in a general way I do. The first phase of his work amounted to straightening up the books and records of the corporation which had been left unattended for some period of time and then after setting up the books, to perform certain audits and other general work in connection with anticipated litigation that the corporation was going to enter into.

Q. Now, pursuant to your discussion, Mr. Charles did enter into the performance of his duties, did he not? A. Yes, he did.

Q. Sometime in early 1955, did you have a discussion with Mr. Charles relative to the payment of any fees for his work?

A. Yes, we had a conversation.

Q. Prior to that conversation, had you paid Mr. Charles anything at all, any consideration at all, for any work that he had done up to that time?

A. No, he had never received any consideration.

Q. As a result of that conversation which you had, Mr. Strube—first, I show you a document which appears to be signed by you and ask you if you recognize it. A. Yes, I do.

Q. Did you prepare the document? [6]

A. Yes.

(Testimony of Gordon D. Strube.)

Q. Is that your signature on it? A. Yes.

Q. Now, was that document prepared as a result of the conversation you had with Mr. Charles relative to the payment of his fees?

A. Yes. I wrote this very soon after the conversation.

Q. Did you deliver that document personally to Mr. Charles?

A. Yes, I delivered it to his office.

Q. Has Mr. Charles, to your knowledge, ever been paid anything whatsoever for any work he has done on the books for American Aeronautics?

A. I know he had not been paid.

Q. Did Mr. Charles do any more work on the books or for American Aeronautics after you delivered this document to him? A. Yes, he did.

Mr. Gross: I would like to introduce this, your Honor, as Petitioner's first exhibit.

The Referee: It will be marked Petitioner's 1.

PETITIONER'S EXHIBIT No. 1

American Aeronautics Corporation
3104 West Vanowen Street, Burbank, California
Rockwell 9-1296
TWX BRB 7127

15 February, 1955

Mr. Milton C. Charles
8907 Wilshire Boulevard
Beverly Hills, California.

(Testimony of Gordon D. Strube.)

Dear Mr. Charles:

Because of the fact that this corporation appears to be entitled to a substantial Income Tax refund and has no monies with which to pay your fees to do the necessary accounting and prepare and file the return in order to obtain it, it is our wish to make some arrangement with you for payment of your services in connection with claim for refund. From estimates received from you, it would appear that this may take as much as forty hours or more in work to be performed by you, and you may consider this an assignment of whatever refund we receive as a result of your services to the extent of \$4,000.00 for such services.

Yours very truly,

AMERICAN AERONAUTICS
CORPORATION,

/s/ GORDON D. STRUBE,
President.

GDS:gjs

[Endorsed]: Filed February 8, 1956.

Mr. Gross: I have no more questions of this witness, your Honor.

Mr. Grodberg: No questions.

The Referee: All right. You may step down,
Mr. Strube. [7]

MILTON C. CHARLES

the Petitioner herein, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gross:

Q. Will you state your full name, please?

A. Milton C. Charles.

Q. What is your business or occupation?

A. Certified public accountant.

Q. Are you licensed to practice in the State of California? A. I am.

Q. How long have you been licensed?

A. I have been licensed since June, approximately June, 1944.

Q. Just briefly, will you give us a touch of your background and experience?

The Referee: He is a C. P. A., so that is not necessary.

Mr. Gross: Very well, your Honor.

Q. Now, sometime in 1954, Mr. Charles, did you have a discussion or were you approached by Mr. Gordon Strube relative to performing some accounting work for American Aeronautics Corporation?

A. I was.

Q. Do you recall approximately when that was? [8]

A. It was either in the latter part of June or the early part of July. I would say before the 2nd or 3rd of July, either somewhere between the 28th of June and the 2nd of July.

Q. 1954? A. 1954, yes.

(Testimony of Milton C. Charles.)

Q. Pursuant to that discussion, did you enter upon the performance of any duties?

A. I did.

Q. On behalf of American Aeronautics Corporation? A. Yes, I did.

Q. Generally, what were you concerned with doing at that time?

A. Well, when I went into the American Aeronautics, I first had a discussion with Mr. Strube. He asked me whether I would take care of the books and records for the company and I said I would be happy to, but I would have to take a look at the books and see what they were all about.

I spent some time just examining the records to see the condition of them. I found that nothing had been done on the books for quite some time. They didn't tell much of a picture, either businesswise or accountingwise, and I told Mr. Strube in order to put those records in good shape it would require a lot of work.

Q. Was there any discussion as to fees at that time? [9]

A. Well, Mr. Strube asked me if I had an idea what it would cost him. I told him it was very difficult for me to determine at that time because I had no idea how many days it would take, although I knew it would require a great deal of time, and I said that about the most reasonable way I could handle it would be to do the job and then determine how much time was spent on it and work on some sort of a per diem basis.

(Testimony of Milton C. Charles.)

Q. Now, sometime in the early part of 1955 after you had performed some of these services for the American Aeronautics Corporation, did you have a discussion with Mr. Strube relative to payment for your services?

A. As a matter of fact, it seems to me it was in the latter part of 1954. I believe it was sometime in December. It may have been shortly before the end of the year or shortly thereafter, and I had said, "Mr. Strube, you realize fully—you have seen me here practically every day. You realize fully that I have put in a great deal of time and now approximately six months have elapsed and I haven't received one dime for my fee," and I said, "Of course, I don't pay my rent on that basis and I think some consideration should be made."

Mr. Gross: May I have Petitioner's 1, your Honor?

The Referee: Yes.

Q. (By Mr. Gross): Now, after that discussion with [10] Mr. Strube, were you delivered by him personally this document which is Petitioner's Exhibit 1? ,

A. You will have to forgive me a minute while I put on my glasses.

Yes, that is it. That was a document that was delivered by Mr. Strube personally.

Q. Was it delivered on or about the date it bears, February 15, 1955?

A. Yes, sir, as close as I can recall, that is the approximate date.

Q. After you had received that document, did

(Testimony of Milton C. Charles.)

you perform any further services on the books of American Aeronautics Corporation?

A. Yes. I had told Mr. Strube after he had made this arrangement with me, or before then even, I said, "If you do what you propose to do, I would be very happy to continue, and even if the services and time will amount to a greater sum than I estimated, I will bring it through to a conclusion so that the books will be in such shape that you will have your closing at the end of the year and prepare any statements or anything else you may need."

Q. All in all, Mr. Charles, how many days did you put in working on the books of American Aeronautics? A. I put in some 40-odd days.

Q. When was the last day approximately, if you recall, that you put in? [11]

A. Well, I continued there practically shortly before the petition, but I had put in the year of 1954 alone approximately 25 to 30 days all told. Incidentally, I put in a lot of time which I had agreed with Mr. Strube I wouldn't charge for.

The Referee: Well, let us talk about what we are in issue here, and that is the time you spent in this employment here.

The Witness: Yes, sir.

The Referee: That is covered by this letter.

The Witness: There were approximately 40 days.

Mr. Gross: Your Honor, at this time, I believe

(Testimony of Milton C. Charles.)

we would like to make a correction in the record. I will ask the question again.

Q. Mr. Charles, when were you licensed as a C.P.A. in the State of California?

A. In June of 1954.

Q. Mr. Charles may have said 1944 before.

A. I thought I said 1954.

Q. Were you licensed in the State of New York as a C. P. A.?

A. Yes, the State of New York. I was licensed in 1932.

The Referee: In June, 1954, you were licensed in California?

The Witness: Yes, sir; and the certificate before [12] that I held in New York which I still hold. Incidentally, I received that in December of 1932.

Q. (By Mr. Gross): In your opinion, Mr. Charles, is \$100 per day a reasonable charge for the work you did at American Aeronautics?

A. As a matter of fact, I believe \$100 would be a minimum.

The Referee: Is 40 days all the work you did? You see, what this refers to is: "Because of the fact that this corporation appears to be entitled to a substantial income tax refund and has no moneys with which to pay your fees to do the necessary accounting and prepare and file the return in order to obtain it, it is our wish to make some arrangement with you for payment of your services in connection with the claim for refund." Now, how much time did you spend on the preparation of the claim for refund?

(Testimony of Milton C. Charles.)

The Witness: Well, the claim for refund itself?

The Referee: That is what I am talking about.

The Witness: That was the smallest part. The claim for refund in and of itself was probably only a few days.

The Referee: How many days?

The Witness: Probably two or three itself. The big part of the job was to get the books in shape so we would have the information.

The Referee: When did you do the labor in preparing [13] the refund?

The Witness: The labor for preparing the refund was in February, sometime in February or so, I believe.

The Referee: February of—

The Witness: —1955.

The Referee: Go ahead, counsel.

Mr. Gross: We have no more questions of this witness.

Mr. Grodberg: No questions.

Mr. Gross: Excuse me. I have one more question.

Q. Have you received any money at all from American Aeronautics for any work you have performed? A. No, sir, not one dime.

Mr. Gross: No more questions.

Mr. Grodberg: No questions.

Mr. Gross: Nothing further, your Honor.

Mr. Grodberg: The Trustee has no further evidence.

Mr. Gross: I would like to point out, your Honor, if I may, that the assignment as it is worded

is somewhat ambiguous in referring only to the work to be done on the pending claim.

That is the reason we had Mr. Strube here today to explain exactly why the assignment was made. The fact was that Mr. Charles had been engaged and had put in a greater portion of 40 days prior to coming to Mr. Strube and asking about the fees, and as a result of that [14] conversation, this assignment was made and it was intended to cover all of the work done rather than the work just relating to the claim.

The Referee: Here is what strikes me about it. In here, he wants to be paid for 40 days, and in this document it says, "From estimates received from you, it would appear that you may take as much as 40 hours or more in work to be performed by you."

Mr. Gross: I am sorry, your Honor. I did forget to bring that out. If I may recall Mr. Strube, I should like to correct that.

The Referee: Very well.

Mr. Gross: Mr. Strube, will you take the stand again?

GORDON D. STRUBE

having been previously sworn, was examined and testified as follows:

Direct Examination
(Continued)

By Mr. Gross:

Q. Mr. Strube, directing your attention to the wording in that document, Petitioner's Exhibit 1, "From estimates received from you, it would appear that you may take as much as 40 hours or more," what prompted you to make a statement such as that? Where did you get the basis of an estimate such as that? [15]

A. Well, in the discussion that I had with Mr. Charles regarding his fees, we had been discussing the amount of work that he had accomplished up to this point and I was interested to know what sort of fees he had built up as a result of his work, and he mentioned at the time that if he continued to finish out the work that he had started and file these income tax returns that it would involve a total of about 40 days of work to go through and complete it.

Q. In other words, Mr. Strube, the question I am asking you is: Why do you have 40 hours down there rather than 40 days?

A. I believe the 40 hours is a dictation error or typographical error on my part. I haven't seen the letter in quite some time, but I was cognizant of the 40 days of work that Mr. Charles was to put in.

(Testimony of Gordon D. Strube.)

Q. To your knowledge, did Mr. Charles put in approximately 40 days of work on the books of American Aeronautics?

A. Yes, I know that he did.

Mr. Gross: No more questions.

Mr. Grodberg: I will have no further questions.

The Referee: Do you have anything further, Mr. Gross?

Mr. Gross: Nothing further, your Honor.

Mr. Grodberg: As far as the Trustee is concerned, [16] if the Court please, we think the document speaks for itself. It is a written assignment. Despite previous conversations, we submit that the agreement itself is the best evidence. We submit the document itself is the evidence.

Mr. Gross: We submit that the document is ambiguous.

The Referee: No, it is not ambiguous here.

Mr. Gross: It is ambiguous, your Honor, in that —may I see the document?

(Court hands document to counsel.)

Mr. Gross: Well, I don't know of any rule of law, your Honor, that would prevent both of the parties from testifying that there was a mistake in the document. It should be 40 days instead of 40 hours.

The Referee: No. There isn't anything that would keep them from testifying to that, but the point is: You are relying on this document.

Mr. Gross: Well, we have brought the parties

here and they have testified that he performed services for a period in excess of 40 days and no consideration was received for it, your Honor.

The Referee: This appears to be in connection with the claim for refund in reading the document, and the witness testified that he spent approximately two or three days in that work. [17]

Mr. Grodberg: I believe the petition and the order to show cause on which it is based is also based on the written document, if the Court please.

The Referee: Your only remedy here is to reform the assignment.

Mr. Gross: Well, there is no dispute between the parties, your Honor. I don't see any necessity to reform it. Both parties testified that it was in payment of all services.

The Referee: The bankrupt is not a party to this matter. The Trustee is the adverse party; not the bankrupt.

Mr. Gross: He stands in the shoes of the bankrupt, and the bankrupt has testified that it was his understanding that the document was to be for payment of the entire services rendered.

The Referee: I would allow your order to show cause to this extent.

Take the highest figure that Mr. Charles gave us here, which is three days, and the high figure of \$100 a day, which seems big to me but maybe it isn't for a certified public accountant.

There is no other evidence as to the value of the services.

The order can be granting allowing you that

amount, \$300, and the remainder, of course, would be [18] subject to a filing of a claim in the case.

Do you want findings and conclusions in this matter?

Mr. Gross: Yes, your Honor.

The Referee: Perhaps I should ask Mr. Grodberg to prepare those.

Mr. Grodberg: Yes, sir.

Mr. Gross: Your Honor, I don't like to belabor the point, but inasmuch as the Court has testified that 40 hours is binding, I wonder if the document isn't thereby made ambiguous because it calls for \$4,000 therefor.

The Referee: If I interpret this document, he had a tax refund and that is what we are talking about here, and this assignment was made to cover the work on the tax refund. The evidence you have offered is that some two or three days were spent in that matter.

Mr. Gross: Well, I believe the evidence is uncontradicted that the document was intended to cover all services rendered.

The Referee: That is not the way the document reads. What you are talking about is reformation, I think.

(Whereupon the hearing was concluded.)

[Endorsed]: No. 15302. United States Court of Appeals for the Ninth Circuit. Milton C. Charles, Appellant, vs. William N. Bowie, Jr., as Trustee in Bankruptcy of American Aeronautics Corporation, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 31, 1956.

Docketed: September 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.